82-1000
No. 82-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

HENRY P. HALSELL
Petitioner,

vs.

KIMBERLY CLARK CORP.
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BILL R. HOLLOWAY
P. O. Box 391
Lake Village, AR 71653
Telephone: 501-265-5956
Attorneys for Petitioner

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTION PRESENTED

1. When a Plaintiff under the Age Discrimination in Employment Act establishes prima facie that he is in the protected group, was discharged while meeting his employer's legitimate expectations, and was replaced by a younger person, can the trial judge deny him finding of fact by the jury to which he is entitled under the Act?

If Court grants Certiorari Petitioner would brief additional questions as to whether error was committed by entering judgment n.o.v. and summary judgment.

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Petitioner, Henry P. Halsell, respectfully prays this Court issue a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit filed on July 26, 1982, No. 81-1873.

OPINIONS BELOW

The opinion of the Court of Appeals is reported in 683 F.2d 285. The opinion of the District Court is reported in 518 F. Supp. 694. The opinion and judgments and the order denying petition for rehearing are included as appendices as is the Order of the District Judge granting partial summary judgment.

JURISDICTION

The opinion of the Court of Appeals was handed down July 26, 1982, and judgment was entered. A timely petition for rehearing and a suggestion for rehearing en banc was denied September 14, 1982. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254 (1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Seventh Amendment to the United States Constitution.

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of common law."

29 U.S.C., Sections 621-634, Age Discrimination in Employment Act, is reproduced in Appendix D.

STATEMENT OF THE CASE

The Factual Background

Petitioner, Halsell, was recruited by Respondent Kimberly Clark Corporation (KC) to be a Project Manager. He was hired by John R. Tinnel, President of Kimtech, a wholly owned subsidary of KC, for initial assignment to Mexico where he was to expand a pulp and paper mill for Kimberly Clark de Mexico (KCM), itself 43% owned by KC (Tr. 501, 502).

Halsell arrived in Mexico August 2, 1974, (Tr. 77) and remained at work there until he was discharged as of November 15, 1975, (Tr. 119) at which time he was 57 years old (Tr. 106).

This was a complex project (Tr. 28) and, while there were difficulties with all its aspects (Tr. 176), by September, 1975, the project was in good shape for it then appeared that it would be completed on time, within budget and with the desired production capacity (Tr. 110, 111, 167, 192).

On September 6, 1975, Tinnell gave Halsell a 10% "merit" pay increase effective August 1, 1975, and evaluated his performance during dinner in Mexico City (Tr. 107). He said that how well Halsell achieved project objectives would be the paramount [superior to all others] indication of his performance (Tr. 267). He said also that he presumed [belief based on probability] that Halsell wold achieve all project objectives on which his bonus was to be based and earn a sizeable bonus for his work (Tr. 108). He said further that Halsell's methods were atypical and their effectiveness determinable solely in terms of final project results (Tr. 109). He then gave him a "provisional" rating which Halsell assumed was a contingent rating pending completion of the project (Tr. 109).

Tinnell arrived at Halsell's office on November 13, 1975, fired him effective November 15, 1975, (Tr. 117, 118) and replaced him with Owen Gentry, who was about 36 years old (Tr. 110) and who had been employed about one month only (Tr. 235). Tinnell's stated reasons were that KCM had lost confidence in Halsell and that some of the U. S. based engineers did not like or care for him, he thought because he had not satisfied their emotional or ego needs (Tr. 119). Halsell thought that Tinnell's reasons were inadequate and probably untrue (Tr. 118). After exhausting other remedies he filed suit (Tr. 123).

The Proceedings In The Courts Below

This case includes the issues of libel, age discrimination in employment, and breach of employment contract. Suit was filed April 23, 1976. The District Court's jurisdiction was invoked under 28 U.S.C. Sec. 1332 because of diversity of citizenship, Halsell being a resident of Lake Village, AR, at the time and Kimberly Clark having its principal place of business in Neenah, WI.

The complaint was amended October 6, 1977, to add age discrimination and libel and to add Wayne Cheng as a defendant. Cheng was dismissed by Order of Chief District Judge Eisele dated March 15, 1978, for lack of in personam jurisdiction. The issue of libel was disposd of by District Judge Richard Arnold in his Order dated October 15, 1979, granting partial summary judgment while holding that there was no publication. The complaint was further amended November 21, 1980, with respect to damages.

The case was tried before a jury in July, 1981, in the Eastern District of Arkansas. At the end of Halsell's case in chief, which came after defense witness Tinnell testified out of turn, the Court directed a verdict in favor of Kimberly Clark on the issue of age discrimination for Halsell had not met the required proof (Tr. 351) but saying in its Memorandum Opinion that Plaintiff presented no proof on that claim. (A-24)

The contract issue was submitted to the jury which found that Kimberly Clark had breached its employment contract with Halsell and awarded him $250,000.00 in damages. The District Court then entered judgment notwithstanding the verdict for Kimberly Clark although its counsel did not renew his motion for a directed verdict at the close of all the evidence.

Halsell filed a timely appeal with the Eighth Circuit whose opinion, filed July 26, 1982, affirmed all actions in the court below. His request for rehearing was denied September 14, 1982.

The Eighth Circuit held on the libel issue that the defamatory memo was not published and on the age discrimination issue that Halsell did not prove that he was qualified and, if he did, Kimberly Clark so rebutted his case through cross examination of his witnesses that a jury could not reasonably have found age discrimination a factor in his discharge. (A-5,A-9-10, A-12-13)

The Court of Appeals excused Kimberly Clark's failure to renew its motion for a directed verdict at the close of all the evidence - a prerequisite for a 50(b) judgment - because it believed that the District court indicated that Kimberly Clark need not do so and because evidence subsequent to the motion did not relate to and affect the contract issue on which a directed verdict was sought. (A-18)

The Court of Appeals affirmed judgment n.o.v. holding that the facts presented at the trial established that Halsell was employed for an indefinite period of time and therefore his employment was terminable at will (A-21). The Appeals Court rejected Halsell's contradictory testimony as to duration (A-21) and did not respond to his contention that the agreement about his bonus opportunities made his employment terminable only for good cause which the jury found was lacking.

REASONS FOR GRANTING THE WRIT

I. To Direct A Verdict Against A Plaintiff Who Has Made Out A Prima Facie Case Under "The Age Discrimination In Employment Act" Is To Deny Him Jury Trial Guaranteed By The Seventh Amendment And By The Act.

Halsell's testimony that he was 57 years old when fired (Tr. 106) and was replaced by a man younger than 40 (Tr. 110) was not controverted.

Halsell's testimony as to his performance was that he predicted early September, 1975, (Tr. 151) that he would achieve all project objectives identified to him (Tr. 85). At that time Tinnell gave him a 10% "merit" pay increase and said that he presumed that Halsell would achieve all project objectives on which his bonus was to be based and would earn a sizeable bonus for his work (Tr. 107, 108). Tinnell said further that Halsell's methods were atypical and their effectiveness determinable only in terms of final project results (Tr. 109). He then gave him a "provisional" rating which Halsell understood was a contingent rating pending project completion.

Halsell's witness Hartwig, who was a U. S. based design engineer on the project, testified that he thought that Halsell's performance was "pretty good under the circumstances" (Tr. 288).

Halsell's witness Withrow, who was an assistant construction manager on the project, testified that whenever he had worked with Halsell he had a superior ability for organization and project work (Tr. 297) and that, after he arrived on the job in late October, 1975, he learned from schedules that had been published that the job was ahead of schedule and he learned from financial documents that the job was below budget. (Tr. 298)

This was Halsell's prima facie case, and it satisfies the most rigorous criteria known to this Petitioner. About his prima facie case the Appeals Court said:

> "Halsell's evidence on this issue consisted solely of his testimony that he had received a pay raise two months before his discharge and a performance rating of 'provisional'. We agree with the district court's determination that this evidence did not establish that Halsell was qualified for the job and, thus, did not raise an inference of age discrimination." (A-8,9)

Clearly, Halsell made out a prima facie case but was denied further proceeding by the application of an unrevealed standard as to sufficiency of the evidence to only a part of his proof. This was to deny him determination of facts by a jury in a manner not in accordance with common law, although a jury trial is guaranteed by the Seventh Amendment and the ADEA.

This Court has addressed discrimination in Title VII cases culminating in *Texas Department of Community Affairs* v. *Burdine,* 450 U.S. 248 (1981) but has not done so in age discrimination cases. Because of the growing number of such cases and the apparent inability of some circuits to follow this Court's analagous determinations in Title VII cases, it is important that this Court give guidance to insure uniformity while giving real meaning to the right to jury trial.

II. The Determinations Of The Eighth Circuit Conflict With This Court's Determinations In *Texas Department of Community Affairs* v. *Burdine.*

The Eighth Circuit said that "even assuming that Halsell presented a prima facie case of age discrimination, Kimberly Clark's rebuttal overwhelmingly established its legitimate, nondiscriminatory reasons for discharging Halsell" and "in this

case, Kimberly Clark presented substantial evidence through cross-examination of plaintiff's witnesses that it had legitimate, nondiscriminatory reasons for discharging Halsell." (A-10)

Halsell's witnesses were Hartwig, Roberge, Walker and Withrow, who were not cross-examined; Flynn, who was cross-examined but who did not testify about Halsell's performance; and Halsell, himself, who did so testify and who was cross-examined. Kimberly Clark did not elicit from Halsell testimony that there were any significant deficiencies in his performance as Petitioner will detail in his brief on the merits, if allowed.

The Appeal Court apparently and necessarily then relied on Tinnell's testimony in concluding that Kimberly Clark rebutted Halsell prima facie case. Assuming for purposes of argument that this is true, the case cannot be ended at this point by a directed verdict against the plaintiff. All that the defendant has done is to rebut the presumption against him resulting from the prima facie case and insulate himself from an adverse directed verdict for he has created an issue which can be resolved only by the jury.

The Eighth Circuit said: "Halsell argues, however, that the defendant's rebuttal evidence simply created a question of fact for the jury, but did not destroy the prima facie case. We do not agree. By satisfying its burden of production, Kimberly Clark eliminated any inference of discrimination raised by Halsell's prima facie case," Citing *Burdine.* (A-11)

The Court of Appeals has misconstrued *Burdine* which says at the place cited: "If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity." 450 U.S. 248, 255 and n 10 which reads:

> "In saying that the presumption drops from the case, we do not imply that the trier of fact no longer may consider evidence previously introduced by the plaintiff to establish a prima facie case. A satisfactory explanation by the defendant destroys the legally mandatory inference of discrimination arising from the plaintiff's initial evidence. Nonetheless, this evidence and inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextural. Indeed, there may be some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation."

The Eighth Circuit has failed to follow *Burdine* and it may be that other courts, encouraged by this, will similarly err. This Court can give guidance by considering this ADEA case in the light of its determination of Title VII cases and make it clear that plaintiff's prima facie case, when rebutted by defendant's explanation, creates an issue of fact for the jury, where jury trial is had.

In this case it is worth noting that on cross-examination Tinnell produced testimony confirming for the most part Halsell's testimony about his performance. (Tr 108, 109, 266, 267)

III. The Eighth Circuit's View Of This ADEA Case Renders The Act Virtually Unenforceable And Thwarts The Will Of Congress.

If we accept the views of the Eighth Circuit in this case, no plaintiff is likely to prevail when proceeding on the basis of disparate treatment.

Assuming that he makes out a prima facie case, the defendant will usually be able to articulate facially neutral reasons for his action. Directed verdict will then be granted for him by those courts which choose to follow this case.

This is made even more likely when one notes how the Eighth Circuit has relaxed the employer's burden in saying that "[i]n an ADEA case, the defendant employer need not persuade the court that the proferred reason in fact justified the discharge because the issue is not whether the reason articulated by the employer warranted the discharge, but whether the employer acted for a nondiscriminatory reason." (A-11)

If we accept this view, the employer need articulate only some reason unrelated to age; which reason may be fabricated, frivolous and unrelated to job performance or his legitimate expectations. Fear of this led the Fifth Circuit to wrongly state the employer's burden of proof in *Burdine, supra,* 257.

Nor can one take comfort in noting that this Court has said "we are unpersuaded that the plaintiff will find it particularly difficult to prove that a proferred explanation lacking a factual basis is a pretext." (*Ibid* 258) This is because he will never get a chance to offer further proof; he will be out of court on a directed verdict.

It requires no research of legislative intent to conclude that Congress did not intend to enact a statute which is in large measure unenforceable.

The state of law in ADEA cases based on disparate treatment will suffer and great mischief result if this case is allowed to stand. This is a matter of great public interest affecting such a large number of litigants that this Court should review and correct the erroneous views of the courts below in this case.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED this 10th day of December, 1982.

BY _____
/s/ BILL R. HOLLOWAY
Attorney for Petitioner

CERTIFICATE OF SERVICE

I, Bill R. Holloway, Attorney for Plaintiff herein, do hereby certify that I have served a copy of the above and foregoing Petition for Writ of Certiorari upon the Honorable James M. McHaney, Owens, McHaney & Calhoun, 1902 First National Building, Little Rock, Arkansas, 72201, by regular United States Mail on this the 10th day of December, 1982.

/s/ BILL R. HOLLOWAY

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-1873

Appeal from the United States
District Court for the
Eastern District of Arkansas.

Henry P. Halsell,
Appellant,

v.

Kimberly-Clark Corporation,
Appellee.

Submitted: April 13, 1982

Filed: July 26, 1982

Before BRIGHT, Circuit Judge; HENLEY, Senior Circuit Judge;* and JOHN R. GIBSON, Circuit Judge.

BRIGHT, Circuit Judge.

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*Judge Henley assumed senior status on June 1, 1982.

Henry Halsell appeals from an adverse judgment in his suit seeking damages for his allegedly wrongful discharge from employment by Kimberly-Clark Corporation (Kimberly-Clark). Because we agree with the district court's[1] disposition of the case, we affirm the judgment of the district court.

I. Background.

In June 1974, Henry Halsell left his job with Spencer Foods to accept employment as a project manager for Kimtech, a wholly owned subsidiary of Kimberly-Clark. Kimtech had contracted to provide design, engineering, and construction services for the expansion of a pulp and paper mill in Orizaba, Mexico, owned by Kimberly-Clark de Mexico (a Mexican corporation in which Kimberly-Clark held a minority interest). In recruiting a supervisor for its operations in Orizaba, Kimtech placed an advertisement for a project manager[2] in a trade journal of the paper industry.

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[1]The Honorable Henry Woods, United States District Judge for the Eastern District of Arkansas. Partial summary judgment was entered before trial by the Honorable Richard S. Arnold, then United States District Judge for the Eastern District of Arkansas. *See infra* p.3 n.3.

[2]

PROJECT MANAGER

A most unique opportunity has just developed for a highly qualified individual.

The company, a subsidiary of one of the leading growth corporations in our industry, consists of one of the most highly qualified groups of managerial and technical people ever assembled in their field. This subsidiary was recently formed at the direction of the Chief Executive Officer of the parent corporation and has his full support. Its policies and objectives were fostered by this outstanding executive and represent some of the industry's most innovative thinking.

The person selected will have an engineering degree, be highly familiar with pulp mill design, have a knowledge of the kraft pulping process and a successful record of project management. He will be a permanent member of the staff and report to a Senior Vice President.

After responding to the advertisement, Halsell was interviewed by John Tinnell, president of Kimtech, and the officials of Kimberly-Clark de Mexico with whom Halsell would work most closely. On June 28, 1974, Tinnell telephoned Halsell to offer him the job as project manager. Halsell requested a written employment contract for a definite period of time. Tinnell responded that he could not offer Halsell such a contract, and that the issue was not negotiable. Halsell accepted Tinnell's offer by telephone the same day. Halsell went to Orizaba, Mexico, as project manager in August 1974, and remained there until his discharge on November 15, 1975.

In October 1977, Halsell instituted this action against Kimberly-Clark, alleging that his discharge constituted a breach of his employment contract. He later amended his complaint to include claims for violation of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1976) (ADEA), and for defamation by one of Kimberly-Clark's employees.

Prior to trial, the district court[3] granted defendant Kimberly-Clark's motion for partial summary judgment on the defamation claim. The parties tried the remainder of the case before a jury. At the close of Halsell's case, however, the court directed a verdict for Kimberly-Clark on the ADEA claim. Thus, the court ultimately submitted only the breach of contract claim to the jury.

The initial assignment will be the management of a $40,000,000 project in a nearby foreign country. He will work with a local consulting firm, supervise design and construction engineers and be responsible to the mill owners.

An excellent compensation package, including a fringe benefit program without peer in our industry is provided.

[3]The Honorable Richard S. Arnold, then United States District Judge for the Eastern District of Arkansas.

In response to special interrogatories, the jury concluded that Kimberly-Clark had breached its employment contract with Halsell, and awarded Halsell $250,000 in damages. The district court, however, subsequently granted Kimberly-Clark judgment notwithstanding the verdict.

Halsell now appeals the judgment of the district court, contending that (1) the district court should not have granted summary judgment on the defamation claim; (2) the district court improperly directed a verdict against him on the ADEA claim because he had established a prima facie case of age discrimination; (3) the court should not have entertained a motion for judgment n.o.v. on the contract claim because Kimberly-Clark failed to renew its motion for a directed verdict on that issue at the close of all the evidence; and (4) the court erred in awarding Kimberly-Clark judgment n.o.v. because the jury's verdict was reasonable and supported by substantial evidence. We consider these arguments in turn.

II. Summary Judgment on Defamation Claim.

Halsell amended his original complaint to include a claim of defamation against Kimberly-Clark and Wayne Cheng, a Kimtech design engineer. The amended complaint alleged that Cheng published a false and defamatory memorandum about Halsell. Cheng had written the memorandum to Al Wendahl, manager of Kimberly-Clark's pulp and paper mill activities, regarding problems with Halsell on the Orizaba project. The memorandum remained in Wendahl's personal files until produced in this litigation.

The district court dismissed the claim against Mr. Cheng individually, for lack of personal jurisdiction. Subsequently, the district court granted Kimberly-Clark partial summary judgment on the defamation issue because no publication of the allegedly defamatory statements had occurred.

> In terms of Kimberly-Clark's liability, the alleged publication was from Kimberly-Clark to Kimberly-Clark when the memorandum travelled from one Kimberly-Clark employee to another. All this amounts to is the corporation, through its agents, talking to itself. Until the defamatory statement is communicated outside the corporate sphere or internal organization, it has not been published. [*Halsell* v. *Kimberly-Clark Corp.*, No. L.R. 76-C-208 (June 24, 1981) (order)(citations omitted).]

An action for defamation requires publication of the allegedly defamatory matter to one other than the defamed person. The Wisonsin Supreme Court[4] has held that communications between officers of a corporation or between different branches of the same corporation, in the course of corporate business, do not constitute publications to third persons. *See Lehner* v. *Associated Press,* 254 N.W. 664, 666 (Wis. 1934); *Flynn* v. *Reinke,* 225 N.W. 742, 744 (Wis. 1929). Because the essential element of publication was lacking in this case, the district court correctly granted partial summary judgment to Kimberly-Clark on the issue of defamation

III. Age Discrimination.

At the close of the plaintiff's case-in-chief, the district court granted defendant Kimberly-Clark's motion for a directed verdict on Halsell's claim under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1976) (ADEA). Halsell contends that the district court should not have directed a verdict because he had established a prima facie case of age discrimination. He seeks a new trial on this issue.

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[4] Because the alleged defamation occurred at Kimberly-Clark headquarters in Neenah, Wisconsin, we apply the substantive law of Wisconsin on the defamation issue in this diversity case.

The Supreme Court recently clarified the parties' respective evidentiary burdens in an employment discrimination case. *See Texas Department of Community Affairs* v. *Burdine,* 450 U.S. 248 (1981).

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. [*Id.* at 252-53 (citations omitted).]

Although the Court in *Burdine* addressed a claim of gender discrimination in violation of Title VII, the same standards apply in an ADEA case. *See Douglas* v. *Anderson,* 656 F.2d 528 (9th Cir. 1981); *Sutton* v. *Atlantic Richfield Co.,* 646 F.2d 407 (9th Cir. 1981).

To establish a prima facie case of age discrimination, Halsell would have to show that Kimberly-Clark discharged him "under circumstances which gave rise to an inference of unlawful discrimination," *Texas Department of Community Affairs* v. *Burdine, supra,* 450 U.S. at 253; *Douglas* v. *Anderson, supra,* 656 F.2d t 531.

Although the proof necessary to establish a prima facie case will vary according to the circumstances of the case, *see Moses* v. *Falstaff Brewing Corp.,* 550 F.2d 1113, 1114 (8th Cir. 1977), the four criteria set forth in *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973), provide one way of establishing a prima facie case of employment discrimination. *See Douglas* v. *Anderson, supra,* 656 F.2d at 531; *Smith v. University of North*

Carolina, 632 F.2d 316 (4th Cir. 1980); *Smithers* v. *Bailar,* 629 F.2d 892 (3d Cir. 1980); *Houser* v. *Sears, Roebuck & Co.,* 627 F.2d 756 (5th Cir. 1980); *Loeb* v. *Textron, Inc.,* 600 F.2d 1003 (1st Cir. 1979).

In *McDonnell Douglas,* the Supreme Court held that a claimant under Title VII could establish a prima facie case of prohibited discrimination by showing that he belonged within the class protected by Title VII, that he applied and was qualified for an available position, that he was not hired despite his qualifications, and that the position remained open after his rejection and the employer continued to seek applicants of comparable qualifications. *McDonnell Douglas Corp.* v. *Green, supra,* 411 U.S. at 902.

In *Loeb* v. *Textron, supra,* the First Circuit used the elements of *McDonnell Douglas* to evaluate a claim of unlawful discharge under the ADEA. Because the complaint stemmed from firing rather than hiring, however, the court modified the four factors in order to produce an analogous inference.

> Complainant would be required to show that he was "qualified" in the sense that he was doing his job well enough to rule out the possibility that he was fired for inadequate job performance, absolute or relative. He would also have to show that his employer sought a replacement with qualifications similar to his own, thus demonstrating a continued need for the same services and skills. Without proof along these lines, the conceptual underpinnings of *McDonnell Douglas* would not remain recognizable. * * * A correct statement of the elements of a *McDonnell Douglas* prima facie case, adapted to present circumstances, therefore would have been that Loeb had to prove that he was in the protected age group. That he was performing his job at a level that met his employer's legitimate expectations, that he nevertheless was fired, and

> that [his employer] sought someone to perform the same work after he left. [*Loeb* v. *Textron, supra,* 600 F.2d at 1013-14 (citations and footnotes omitted).]

Halsell contends that he established a prima facie case of age discrimination according to the *McDonnell Douglas* factors as modified by *Loeb* v. *Textron.* Halsell, who was fifty-seven years old at the time of his discharge, fell within the age group protected by the ADEA, which applies to individuals between the ages of forty and seventy. *See* 29 U.S.C.A. § 631(a) (West Supp. 1982). After discharging Halsell on November 15, 1975, Kimtech appointed an engineer in his mid-thirties as Halsell's replacement. Finally, Halsell contends that he was "qualified" for the job in the sense that he had performed his duties in a manner that met Kimberly-Clark's legitimate expectations. As evidence of his employer's satisfaction with his work, Halsell testified that he had received a ten percent pay increase two months prior to his discharge. Halsell also indicated that, after a year at the Orizab project, he received a performance rating of "provisional," which he assumed indicated a temporary or contingent evaluation pending completion of the project.

Halsell maintains that this evidence amounted to a prima facie case of age discrimination, and therefore the district court improperly directed a verdict on his ADEA claim. We do not agree with Halsell's argument for two reasons. First, we doubt that Halsell has, in fact, established a prima facie case of age discrimination. Although the Supreme Court stated in *Burdine* that "[t]he burden of establishing a prima facie case of disparate treatment is not onerous [,]" *Texas Department of Community Affairs* v. *Burdine, supra,* 450 U.S. at 253, the Court also ruled that "the plaitniff has the burden of proving *by the preponderance of the evidence* a prima facie case of discrimination." *Id.* at 252-53 (emphasis added).

To establilsh a prima facie case of discrimination, the plaintiff must produce sufficient evidence to support an inference that the defendant employer based its employment decision on an illegal criterion. *See Furnco Construction Corp.* v. *Waters,* 438 U.S. 567, 577 (1978); *International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324, 358 (1977); *Douglas* v. *Anderson, supra,* 656 F.2d at 532. In considering whether Halsell has produced sufficient evidence to support such an inference, this court must determine whether Halsell showed that he was qualified for the job in the sense that his performance met Kimberly-Clark's legitimate expectations. Halsell's evidence on this issue consisted solely of his testimony that he had received a pay raise two months before his discharge and a performance rating of "provisional." We agree with the district court's determination that this evidence did not establish that Halsell was qualified for the job, and, thus, did not raise an inference of age discrimination.

Secondly, even assuming that Halsell presented a prima facie case of age discrimination, Kimberly-Clark's rebuttal overwhelmingly established its legitimate, nondiscriminatory reason for discharging Halsell.

Secondly, even assuming that Halsell presented a prima facie case of age discrimination, Kimberly-Clark's rebuttal overwhelmingly established its legitimate, nondiscriminatory reason for discharging Halsell.

The ADEA specifically provides that discharge of protected individuals for good cause shall not be unlawful. 29 U.S.C. § 623(f) (3) (1976). Moreover, establishment of a prima facie case of employment discrimination does not automatically entitle the plaintiff to a jury determination on the discrimination claim. The concept of "the prima facie case" outlined in *McDonnell* means only that the plaintiff has produced enough evidence to shift the burden of production to the defendant.

> The phrase "prima facie case" may denote not only the establishment of a legally mandatory, rebuttable presumption, but also may be used by courts to decribe the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at isue. 9 J. Wigmore, Evidence § 2494 (3d ed. 1940). *McDonnell Douglas* should have made it apparent that in the Title VII context we use "prima facie case" in the former sense. [*Texas Department of Community Affairs* v. *Burdine, supra* at 254 n.7.]

In this case, Kimberly-Clark presented substantial evidence through cross-examination of plaintiff's witnesses, that it had legitimate reasons for discharging Halsell. Kimberly-Clark has received repeated complaints from a variety of sources regarding Halsell's performance as project manager. John Tinnell, Kimtech's president, testified for Kimberly-Clark[3] that various Kimtech engineers had complained about Halsell's failure to provide them with adequate information or guidance, and the lack of an overall schedule for the project. Tinnell also stated that Kimberly-Clark de Mexico's expressions of concern about Halsell's inability to keep the project on schedule contributed to Kimberly-Clark's decision to replace him. This evidence more than adequately satisfied Kimberly-Clark's burden of articulating a legitimate, nondiscriminatory reason for discharging Halsell.

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[3] The district court allowed Kimberly-Clark to present John Tinnell's testimony before Halsell had completed presentation of his case-in-chief. Although the court granted Kimberly-Clark's motion for a directed verdict at the close of Halsell's case-in-chief, we do not limit ourselves to the plaintiff's evidence in evaluating Halsell's ADEA claim on appeal. As other courts have noted, "*McDonnell Douglas* does not require a three-step 'judicial minuet' of procedure." *Flowers* v. *Crouch-Walker Corp.*, 522 F.2d 1277, 1281 (7th Cir. 1977), *citing Sime* v. *Trustees of California State University and Colleges*, 526 F.2d 1112 (9th Cir. 1975).

In particular, we recognize no impediment to our consideration of Tinnell's testimony taken out of turn in evaluating Kimberly-Clark's rebuttal testimony.

Halsell argues, however, that the defendant's rebuttal evidence simply created a question of fact for the jury, but did not destroy the prima facie case. We do not agree. By satisfying its burden of production, Kimberly-Clark eliminated any inference of discrimination raised by Halsell's prima facie case. *See Texas Department of Community Affairs* v. *Burdine, supra,* 450 U.S. at 255 & n.10 (if defendant carries burden of production, presumption of discrimination drops from case); *Smithers* v. *Bailar, supra,* 629 F.2d at 895 (inference of discrimination dissolves when employer shows legitimate nondiscriminatory reason for conduct).

We do not believe that the jury's verdict for Halsell on his breach of contract claim in any way affects our conclusion that Kimberly-Clark articulated a legitimate nondiscriminatory reason for discharging Halsell. The parties bear different burdens on the ADEA claim and the breach of contract claim. In an ADEA case, the defendant employer need not persuade the court that the proffered reason in fact justified the discharge because the issue is not whether the reason articulated by the employer warranted the discharge, but whether the employer acted for a nondiscriminatory reason.

In *Douglas* v. *Anderson, supra,* the Ninth Circuit explained the relationship as follows:

> The issue of satisfactory job performance permeates the prima facie case as well as the rebuttal and pretext issues. In establishing a prima facie case, Douglas need only produce substantial evidence of satisfctory job performance sufficient to create a jury question on this issue. However, Hastings in rebuttal produced substantial evidence of unsatisfactory job performance as the legitimate nondiscriminatory reason for its action. The focus of the inquiry, at this point, was not a determination of whether Douglas was in fact performing his job adequately, but rather, whether there was sufficient evidence of unsatisfac-

> tory performance to be a legitimate concern of his employer. This differs from a determination that just cause existed for the termination because of unsatisfactory job performance, which would necessitate a finding that his job performance was unsatisfactory. In the case at hand, we are concerned not with whether Hastings was correct in its determination that Douglas's job performance was unsatisfactory, but only with whether this was the real reason for the termination and not a pretext for age discrimination. [*Douglas* v. *Anderson, supra,* 656 F.2d at 533 n.5.]

Following *Burdine,* the court in *Douglas* v. *Anderson* acknowledged that the employer carries its burden of production by introducing some evidence of a legitimate, nondiscriminatory reason for its action. Thus, the defendant bears a lesser burden in rebutting the plaintiff's prima facie case on the ADEA claim than in presenting a defense of good cause on a breach of contract claim.

A trial court should direct a verdict for an ADEA defendant only when no jury could reasonably conclude that age was a determining factor in the decision to discharge the plaintiff. *Douglas* v. *Anderson, supra,* 656 F.2d at 533. In affirming a directed verdict entered by the district court, the Ninth Circuit stated:

> We conclude that [the employer] did more than raise an issue of fact in satisfaction of its burden of production. The evidence that Douglas was discharged for a legitimate, nondiscriminatory reason is overwhelming and completely undermines any inference of discrimination that may have been raised through circumstantial evidence presented by Douglas. [*Douglas* v. *Anderson, supra,* 656 F.2d at 534.]

Our review of the record in the case before us reveals that Kimberly-Clark's rebuttal evidence similarly did more than

create an issue of fact for the jury. Kimberly-Clark presented extensive evidence of its nondiscriminatory reasons for dissatisfaction with Halsell's performance as manager of the Orizaba project, which completely undercut any suggestion that Kimberly-Clark discharged Halsell because of his age. Kimberly-Clark more than rebutted any hint of age discrimination in Halsell's discharge so that a jury could not reasonably have found age discrimination a factor in his discharge. Accordingly, we affirm the directd verdict for Kimberly-Clark on the ADEA claim.[4]

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[4] We distinguish this case from *Tribble* v. *Westinghouse Electric Corp.*, 669 F.2d 1193 (8th Cir. 1982) in which another panel of this court affirmed the denial of a defendant-employer's motion for a directed verdict on an ADEA claim. In *Tribble*, the court stated that "[t]he mere fact that Westinghouse articulated a legitimate nondiscriminatory reason for its discharge of plaintiff does not mean that Westinghouse is entitled to have a verdict directed in its favor." *Id.* at 1196.

Unlike the case now before us, the plaintiff in *Tribble* had presented evidence from which the jury could infer that the plaintiff's age contributed to his discharge. "We believe that the jury could reasonably believe that age, as well as the [intracompany] reorganization, was a determining factor in Westinghouse's decision to eliminate Tribble's position and not hire Tribble into any other available job." *Id.* Accordingly, the court concluded that the district court had properly denied Westinghouse's motion for a directed verdict on Tribble's ADEA claim.

Because Halsell failed to introduce evidence from which a jury could infer that his age was a factor in his discharge our affirmance of the directed verdict in the instant case creates no inconsistency with *Tribble*.

IV. Judgment N.O.V. On The Contract Claim.

A. Kimberly-Clark's Failure To Move For A Directed Verdict At The Close Of All The Evidence.

At the close of Halsell's case-in-chief, defendant Kimberly-Clark moved for a directed verdict on both the age discrimination and employment contract claims. After granting the motion on the ADEA claim, the court reserved decision on the motion for directed verdict regarding the contract claim.

When Kimberly-Clark had substantially completed presentation of its defense, but prior to Halsell's rebuttal evidence, the court held a conference on proposed instructions outside of the hearing of the jury. At that time, Kimberly-Clark renewed its motion for a directed verdict. The court indicated that Kimberly-Clark should wait until the end of the case to renew the motion, but asked that the record reflect that Kimberly-Clark had renewed its motion and that the court had again reserved decision on it.[7]

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[7]The following exchange took place between the court and defense counsel:

> [DEFENSE COUNSEL]: Can the record show that we renew our motion for a directed verdict.
>
> THE COURT: Well, I think you had better let that wait until the end of the case. I don't believe it's the proper time to do that, but with the jury in here. We're not going to take any time and have them go out. I'm just going to say that let the record show you renew it and the Court makes the same ruling.

The evidence presented when the court resumed session was brief, and neither party introduced further evidence on the nature of the employment contract. Kimberly-Clark introduced part of a deposition concerning the reason for Halsell's discharge, and some answers Halsell made to interrogatories on the issue of damages. In rebuttal, Halsell testified in his own behalf regarding his performance as project manager.

The court then submitted the contract issue to the jury with interrogatories to which the jury responded as follows:

> INTERROGATORY NO. 1: Do you find from a preponderance of the evidence that Kimberly-Clark Corporation breached an employment contract it had with Henry Halsell?
>
> ANSWER: Yes.
>
> INTERROGATORY NO. 2: Answer this interrogatory only if you answered "yes" to Interrogatory No. 1.
>
> Do you find from a preponderance of the evidence that the employment contract between Kimberly-Clark Corporation and Henry Halsell was an oral contract for personal services which was not to be performed within one year?
>
> ANSWER: Yes.
>
> INTERROGATORY NO. 3: Answer this interrogatory only if you answered "yes" to Interrogatory No. 1.
>
> State the amount of any damages which you find from a preponderance of the evidence were sustained by Henry Halsell as a result of Kimberly-Clark Corporation's breach of contract.
>
> ANSWER: $250,000.00
>
> [*Halsell* v. *Kimberly-Clark Corp.*, 518 F. Supp. 694, 695 (E.D. ARk. 1981).]

Kimberly-Clark moved for judgment notwithstanding the jury's answers to interrogatories numbers 1 and 3. The district court granted Kimberly-Clark judgment n.o.v. on the ground that Halsell's contract of employment was not for a specified time, and was therefore terminable at the will of either party. The court also held the award of damages grossly excessive.

Halsell appeals from the district court's entry of judgment n.o.v., contending, first, that Kimberly-Clark failed to move for a directed verdict at the close of all the evidence, as required by Fed. R. Civ. P. 50(b),[1] and thereby waived its right to move for judgment n.o.v.

We agree with Halsell's contention that a party may not move for a judgment n.o.v. without first having moved for a directed verdict at the close of all the evidence. *See Cargill, Inc.* v. *Weston,* 520 F.2d 669, 671 (8th Cir. 1975); *Tsai* v. *Rosenthal,*

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[1]Rule 50(b), Fed. R. Civ. P. provides:

> (b) *Motion for Judgment Notwithstanding the Verdict.* Whenever a motion for a directed verdict *made at the close of all the evidence* is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial. [Emphasis added.]

297 F.2d 614, 618 (8th Cir. 1961). This prerequisite affords the party against whom the motion for a directed verdict is made an opportunity to cure any defects in proof, and enables the court to reexamine the issue *as a matter of law* if the jury returns a verdict contrary to the movant. *See Mutual Benefit Health & Accident Association* v. *Thomas,* 123 F.2d 353, 355 (8th Cir. 1941); 5A J. Moore, Moore's Federal Practice ¶ 50.08 (3d ed. 1982).

We note, however, that courts have taken a liberal view of what qualifies as a motion for a directed verdict in allowing a subsequent motion for judgment n.o.v. *See Moran* v. *Raymond Corp.,* 484 F.2d 1008, 1011 (7th Cir. 1973), *cert. denied,* 415 U.S. 932 (1974); *Albrecht* v. *Herald Co.,* 452 F.2d 124, 127 (8th Cir. 1971); *Beaumont* v. *Morgan,* 427 F.2d 667, 670 (1st Cir.), *cert. denied,* 400 U.S. 882 (1970); *States* v. *353 Cases,* 247 F.2d 473, 477 (8th Cir. 1957). Although the movant fails to renew its motion for a directed verdict at the conclusion of all the evidence introduced after the motion for directed verdict was brief, and the court somehow indicated that renewal of the motion would not be necessary to preserve the right to move for judgment n.o.v. *See Bayamon* v. *Thom McAnn, Inc.* v. *Miranda,* 409 F.2d 968, 972 (1st Cir. 1969).

In this case, Kimberly-Clark attempted to renew its motion for a directed verdict during the instruction conference on the afternoon of the third and final day of trial. Because the parties had not finished presenting all the evidence, the court advised the defendant that the proper time to renew the motion would be at the close of all the evidence. At the same time, however, the court stated that it considered the motion renewed.

We believe the district court's comment indicated to Kimberly-Clark that it need not move for a directed verdict again at the close of all the evidence to preserve its right to move for judgment n.o.v. Furthermore, the evidence introduced

subsequent to the motion for directed verdict did not relate to the nature of the employment contract, and therefore did not affect the contract issue on which Kimberly-Clark sought a directed verdict.

In addition, Halsell did not raise this objection to Kimberly-Clark's motion for judgment n.o.v. at the time of its making. When the Seventh Circuit considered a case in a similar procedural posture, it stated: "We do not view favorably the raising of an issue, particularly a technical one, for the first time on appeal." *Moran* v. *Raymond Corp., supra,* 484 F.2d at 1011. We likewise are unwilling to allow Halsell's belated objection to overcome Kimberly-Clark's substantial compliance with Fed. R. Civ. P. 50(b). Consequently, we believe the district court properly entertained Kimberly-Clark's motion for judgment n.o.v.

B. Entry Of Judgment N.O.V.

Halsell challenges the district court's entry of judgment n.o.v. on the ground that substantial evidence supported the jury's responses to interrogatories 1 and 3. The jury responded affirmatively to interrogatory number 1, finding that Kimberly-Clark had breached its employment contract with Henry Halsell. The district court, nevertheless, granted Kimberly-Clark judgment n.o.v. because

> the contract of employment was not for a specified time, under the undisputed evidence in this case. It was, therefore, terminable at the will of either party. In this regard the law of Arkansas and of Wisconsin (where the plaintiff was hired) is the same. [*Halsell* v. *Kimberly-Clark Corp.*, 518 F. Supp. 694, 695 (E.D. Ark. 1981).]

In determining whether a party is entitled to judgment notwithstanding an adverse jury verdict, the trial court must view the evidence in the light most favorable to the party who prevailed before the jury. *Walsh* v. *Ingersoll-Rand Co.*, 656 F.2d 367

(8th Cir. 1981). The court should grant a motion for judgment n.o.v. if, without weighing the witnesses' credibility, only one reasonable conclusion follows from the evidence presented. *Davis* v. *Burlington Northern, Inc.*, 541 F.2d 182, 186 (8th Cir.), *cert. denied*, 429 U.S. 1002 (1976).

In entering a judgment n.o.v., the district court ruled that, as a matter of law, the parties had not presented sufficient evidence to create an issue for the jury. Here, the court determined that under either Wisconsin or Arkansas law, the employment contract between Henry Halsell and Kimberly-Clark was terminable at will of either party. Under Wisconsin law (lex locus contractus) an employment relation continues at the will of either party in the absence of a specific contractual limitation. *See Hanson* v. *Chicago, Burlington and Quincy Railroad*, 282 F.2d 58 (7th Cir. 1960); *Ward* v. *Frito-Lay, Inc.*, 290 N.W.2d 536 (Wis. 1980); *Goff* v. *Massachusetts Protective Association*, 176 N.W.2d 576 (Wis. 1970); *Forrer* v. *Sears, Roebuck & Co.*, 153 N.W.2d 587 (Wis. 1967). Arkansas law (lex fori) also makes a contract of employment terminable at the will of either party if it contains no agreement as to a specific length of time. *See Tinnon* v. *Missouri Pacific Railroad*, 282 F.2d 773 (8th Cir. 1960). *M.B.M. Co.* v. *Counce*, 596 S.W.2d 681 (Ark. 1980); *Miller* v. *Missouri Pacific Transportation Co.*, 283 S.W.2d 158 (Ark. 1955); *Petty* v. *Missouri & Arkansas Railway*, 167 S.W.2d 895, *cert. denied*, 320 U.S. 738 (1943).

In this case, the district court concluded that the employment agreement between Halsell and Kimberly-Clark was not for a specified time, "under the undisputed evidence in this case." *Halsell* v. *Kimberly-Clark Corp.*, *supra*, 518 F. Supp. at 695.

Halsell argues on appeal that the parties disputed the duration of his employment contract with Kimberly-Clark. Halsell maintains that he offered evidence to support his contention that he had a contract of definite duration; that his employment would

end when he reached retirement age. Kimberly-Clark, by contrast, alleged that it had hired Halsell for an indefinite period of time.

We cannot accept Halsell's assertion that the parties had presented conflicting evidence as to the *duration* of Halsell's employment contract. Halsell failed to produce any evidence that Kimberly-Clark had hired him for a definite period of time. The advertisement to which he responded stated that the employee would be "a permanent member of the staff," but that language merely indicated that the company did not seek to hire a manager for a single project only. Moreover, Halsell sought but failed to secure a written employment contract from Kimberly-Clark.[9] Halsell's assertion that he was hired until the time he would have to retire amounts to a conclusory statement without evidentiary support. He could have shown such a definite period of employment by showing, for example, that Kimberly-Clark did not employ him to supervise the Orizaba project only.

The district court indicated in its opinion that it would have directed a verdict for Kimberly-Clark at the close of the case, but reserved its ruling in accordance with the preferred practice of submitting such questions to the jury. *See Halsell* v. *Kimberly-Clark Corp., supra,* 518 F. Supp. at 695. Because the same standard applies to a motion for judgment n.o.v. as to a motion for a directed verdict, *Smith* v. *Hussman Refrigerator Co.,* 619 F.2d 1229, 1235 (8th Cir.)(*en banc*), *cert. denied,* 449

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[9]The district court observed in its opinion that

> [i]n fact in plaintiff's own notes, made shortly after his termination, and verified by him on the witness stand, he wrote as follows: "I had bargained for higher pay, for pension rights and for an employment contract but without any success."
> [*Halsell* v. *Kimberly-Clark Corp., supra,* 518 F. Supp. 695.]

U.S. 839 (1980); *Schneider* v. *Chrysler Motors Corp.*, 401 F.2d 549, 554 (8th Cir. 1968), the court determined that Kimberly-Clark was entitled to a judgment n.o.v. as a matter of law.

After reviewing the record, we agree with the district court's conclusion that the facts presented at trial establish that Kimberly-Clark employed Halsell for an indefinite period of time. Thus, the employment was terminable at the will of either party. Having affirmed the district court's entry of judgment n.o.v. in favor of Kimberly-Clark, we need not review the district court's ruling on damages.

V. **Conclusion.**

We affirm the district court's rulings on all of Henry Halsell's claims against Kimberly-Clark. The district court properly entered summary judgment on Halsell's defamation claim. After reviewing the record in this case, we also believe the district court acted properly in directing a verdict in favor of Kimberly-Clark on Halsell's ADEA claim. Finally, we affirm the district court's entry of judgment n.o.v. on Halsell's contract claim.

Affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term 1982

No. 81-1873

Henry P. Halsell,
Appellant,

v.

Kimberly-Clark Corporation,
Appellee.

Appeal from the United States
District Court for the
Eastern District of Arkansas

The Court, having considered appellant's petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied. Judges Heaney and McMillian would grant the petition for rehearing en banc. Judge Arnold took no part in the vote.

September 14, 1982

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-1873

September Term, 1981

Henry P. Halsell,
Appellant,

v.

Kimberly-Clark Corporation,
Appellee.

JUDGMENT

(Filed September 23, 1982)

This appeal from the United States District Court for the Eastern District of Arkansas was considered on a designated record from the United States District Court and on briefs of the respective parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in accordance with the opinion of this Court.

July 26, 1982

/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals,
Eighth Circuit 9/21/82

A True Copy:

ATTEST:

APPENDIX B

In The United States District Court
Eastern District Of Arkansas
Western Division

No. LR-76-C-208

Henry P. Halsell
Plaintiff

v.

Kimberly-Clark Corporation
Defendant

JUDGMENT

(Filed July 24, 1981)

On July 13, 1981 this cause comes on for trial by jury. After opening statements, presentation of evidence, arguments of counsel and instructions of the Court, the jury returned its verdict on July 15, 1981 in the form of answers to the following interrogatories:

> INTERROGATORY NO. 1: Do you find from a preponderance of the evidence that Kimberly-Clark Corporation breached an employment contract it had with Henry Halsell?
>
> ANSWER: Yes
>
> INTERROGATORY NO. 2: Answer this interrogatory only if you answered "yes" to Interrogatory No. 1.
>
> Do you find from a preponderance of the evidence that the employment contract between Kimberly-Clark Corporation and Henry Halsell was an oral contract for personal services which was not to be performed within one year?

ANSWER: Yes

INTERROGATORY NO. 3: Answer this interrogatory only if you answered "yes" to Interrogatory No. 1.

State the amount of any damages which you find from a preponderance of the evidence were sustained by Henry Halsell as a result of Kimberly-Clark Corporation's breach of contract.

ANSWER: $250,000.00

Notwithstanding the above answers to the interrogatories submitted to the jury, and in accordance with the memorandum opinion filed contemporaneously herewith, judgment is rendered for the defendant together with his costs herein expended.

In the event that this judgment should be hereafter vacated or reversed, the Court finds pursuant to Rule 50(c)(1) that defendant would be entitled to a new trial because the answer to Interrogatory No. 1 is against a clear preponderance of the evidence and the damages assessed in Interrogatory No. 3 are grossly excessive.

This 24th day of July, 1981.

/s/ Henry Woods, U.S. District Judge

In The United States District Court
Eastern District Of Arkansas
Western Division

No. LR-76-C-208

Henry P. Halsell
Plaintiff

v.

Kimberly-Clark Corporation
Defendant

MEMORANDUM OPINION

(Filed July 24, 1981)

On April 28, 1976 plaintiff filed suit against defendant for damages resulting from an alleged wrongful discharge of plaintiff from his employment with the defendant. Plaintiff later filed a series of amended complaints adding a claim for age discrimination. Plaintiff presented no proof on the latter claim, and it was not submitted to the jury. After a three-day jury trial, the Court would have directed a verdict on behalf of the defendant. However, decision was reserved on motions for directed verdict, and the breach of contract issue was submitted to the jury in accordance with the suggestions of the Court of Appeals for this Circuit. See *Hoppe* v. *Midwest Conveyor Co.*, 485 F.2d 1196, 1198 n. 1 (8th Cir. 1973) and *Parker* v. *Seaboard Coastline R.R.*, 573 F.2d 1004, 1006, n. 3 (8th Cir. 1978).

Three interrogatories were propounded, and the answers of the jury were as follows:

> INTERROGATORY NO. 1: Do you find from a preponderance of the evidence that Kimberly-Clark Corporation breached an employment contract it had with Henry Halsell?

ANSWER: Yes

INTERROGATORY NO. 2: Answer this interrogatory only if you answered "yes" to Interrogatory No. 1.

Do you find from a preponderance of the evidence that the employment contract between Kimberly-Clark Corporation and Henry Halsell was an oral contract for personal services which was not to be performed within one year?

ANSWER: Yes

INTERROGATORY NO. 3: Answer this interrogatory only if you answered "yes" to Interrogatory No. 1.

State the amount of any damages which you find from a preponderance of the evidence were sustained by Henry Halsell as a result of Kimberly-Clark Corporation's breach of contract.

ANSWER: $250,000.00

Notwithstanding these answers, judgment n.o.v. will now be entered for the defendant pursuant to its post-trial motion. Although the plaintiff contends that he had a contract with defendant for "permanent" employment to 65 years of age, there is an absence of evidence to support such a claim. In fact in plaintiff's own notes, made shortly after his termination, and verified by him on the witness stand, he wrote as follows: "I had bargained for higher pay, for pension rights and for an employment contract but without any success." The plaintiff was hired over the telephone to serve as project manager for a $50,000,000 paper mill expansion which defendant was constructing at Ozibaza, Mexico for its Mexican subsidiary, Kimberly-Clark de Mexico. Much of the evidence in the case was directed to the issue of whether defendant terminated plaintiff for good cause. The Court finds that the evidence preponderated in defendant's favor on this issue but was probably sufficient to send it to the jury.

However, defendant is entitled to judgment notwithstanding the answer to Interrogatory No. 1 because the contract of employment was not for a specified time, under the undisputed evidence in this case. It was, therefore, terminable at the will of either party. In this regard the law of Arkansas and of Wisconsin (where the plaintiff was hired) is the same. Wisconsin law was reviewed by the Seventh Circuit in *Hanson* v. *B. & O. R. R. Co.*, 282 F.2d 58 (7th Cir. 1960):

> Plaintiff alleges no consideration for his employment as a fireman other than the stipulated wage for his services as rendered. In such circumstances, where there is nothing to fix the duration of a contract, a contract for "permanent" employment is in effect a contract of general employment terminable at will . . . . In Wisconsin, an employment relation, in the absence of contractual limitation, continues at the will of either party. Saylor v. Marshall & Illsley Bank, 1937, 224 Wis. 511, 515, 272 N.W. 369; Brown v. Oenida Knitting Mills, 1938, 226 Wis. 662, 669, 277 N.W. 653. At 759-60.

This principle remains in effect in Wisconsin. *Ward* v. *Frito-Lay, Inc.*, 95 Wis.2d 372, 290 N.W.2d 536 (1980); *Goff* v. *Mass. Protective Ass'n*, 46 Wis.2d 712, 176 N.W.2d 575 (1970); *Forrer* v. *Sears, Roebuck & Co.*, 36 Wis.2d 388, 153 N.W.2d 587 (1967).

Arkansas law was reviewed by the Eighth Circuit in *Tinnon* v. *Missouri Pacific R.R. Co.*, 282 F.2d 773 (8th Cir. 1960) in an opinion written by Justice Blackmun:

> Arkansas law seems to be precise and definite. The Supreme Court of that state in a wrongful discharge case decided in 1897 held, one judge dissenting, that because the contract of employment contained no agreement by the employee to serve any specific length of time, there was no

> breach of contract in discharging him . . . . St. Louis I.M.& S.Ry. Co. v. Mathews, 64 Ark. 398, 42 S.W. 902, 903, 39 L.R.A. 467. In 1943, 46 years later, and again by a divided court, this holding was reaffirmed in another railroad discharge case, the court stating that this was "in harmony with the rule of mutuality of obligation." Petty v. Missouri & Arkansas Ry. Co., 205 Ark. 990, 167 S.W.2d 895, 897, *certiorari denied* 320 U.S. 738, 64 S.Ct. 37, 88 L.Ed. 457. At 776.

This principle was recently reaffirmed in *M. B. M. Co., Inc.* v. *Counce,* 268 Ark. 269, 596 S.W.2d 681, 684 (1980) when Chief Justice Fogleman wrote that "where no definite term of employment is specified in the contract of employment, and in the absence of other circumstances controlling the duration of employment, the contract is terminable at the will of either party." See also *Miller* v. *Missouri Pac. Transportation Co.,* 225 Ark. 475, 283 S.W.2d 158 (1955), from which Judge Fogleman derived the above rule.

Based on the jury's answer to Interrogatory No. 2, which was supported by substantial evidence and conformed to plaintiff's own contentions, the defendant would also be entitled under Arkansas law to judgment notwithstanding its answer to the interrogatory. It is undisputed that the contract of employment was an oral contract. In fact, plaintiff's counsel frankly admitted this fact in his opening statement to the jury. Ark.Stat.Ann. § 38-101 provides in part:

> No action shall be brought . . . to charge any person upon any contract, promise, or agreement, that is not to be performed within one [1] year from the making thereof.

The Statute of Frauds applies to employment contracts. *Swafford Ice Cream* v. *Sealtest,* 257 Ark. 1181 (1972). "A parol contract for personal services for a longer period than one year is

within the Statute of Frauds, and no action can be maintained on it; and if the employee enter upon its performance and is afterwards discharged, the employer is liable only for his wages for the time he served." *Id.* at 1187.

However, although the point was not raised by either party, the application of the statute of frauds may well be determined by Wisconsin law since the contract was made in that state. The preeminent conflict of laws scholar Robert A. Leflar points out that "the modern cases deal with it as substantive, though a number of the older cases treated some sections of the statute as procedural." Leflar, AMERICAN CONFLICTS LAW, § 125, p. 248 (3d Ed. 1977). The Arkansas statute quoted above contains wording similar to section four of the original English statute while the applicable Wisconsin section is more akin to original section seventeen, reading as follows:

> *Agreements, what must be written.* In the following case every agreement shall be void unless such agreement or some note or memorandum thereof, expressing the consideration, be in writing and subscribed by the party charged therewith: (1) Every agreement that by its terms is not to be performed within one year of the making thereof. Wisc.Ann.Stats. § 241.02, ch. 241.

Dean Leflar points out that the variation in wording between section four and section seventeen of the original English statute has resulted in much of the confusion in the cases:

> The English courts referred to the wording of the particular section of the statute involved and, if it was worded in terms of remedy, they held it to be procedural, so that the law of the forum governed. Under the wording of section four of the original English statute, "No action shall be brought . . .," this result was reached, whereas the original section 17 which read[s], "No contract . . . shall be good unless . . . (in writing)," was deemed substantive

> because it was worded substantively. It is, however, difficult to believe that the variant wording of these sections was other than accidental; there is no evidence that the framers of the legislation had in mind the applicability of the statute to some domestic contracts and its nonapplicability to others. Modern authority rejects the technical distinction based on wording and looks to see the real effect of the statute in operation. The statute, like the parol evidence rule, really determines what is the enforceable contract, which is another way of saying that it determines whether a substantive right exists. Leflar, AMERICAN CONFLICTS LAW, § 125, 248-49 (3d Ed. 1977).

If we accept Dean Leflar's very logical approach and apply Wisconsin law, the result in this case is not changed, but the Statute of Frauds will not be applied to the contract. The Wisconsin cases do not apply the statute of frauds to an indeterminable employment contract for the very reason that the contract is terminable at will.

In the Wisconsin case of *Kinzfogl* v. *Greiner*, 265 Wis. 105, 60 N.W.2d 741 (1953), the rule was concisely stated:

> There are allegations in the record that the only time the term of employment was discussed was at the time of the original hiring, and that plaintiff's employment was for an indefinite period. *Such a contract, because terminable at will, is a valid contract even though it is not in writing.* Kirkpatrick v. Johnson, 256 Wis. 208, 40 N.W.2d 372. (Emphasis added)

This 21 day of July, 1981.

/s/ HENRY WOODS, U. S. District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DISTRICT

No. LR-76-C-208

Henry P. Halsell,
Plaintiff,

v.

Kimberly-Clark Corporation,
Defendant.

ORDER

(Filed Oct. 17, 1979)

Pending before the Court is the defendant's motion for partial summary judgment on the issue of defamation. The motion is granted on the ground that there was no publication.

The issue of defamation entered this case when plaintiff filed an amended complaint alleging defamation against Kimberly-Clark and Mr. Wayne Cheng, an employee of Kimberly-Clark. The amended complaint alleged that Mr. Cheng "caused to be published and disseminated to the plaintiff's superiors and others with the Kimberly-Clark Corporation" a defamatory memorandum. The complaint against Mr. Cheng has been dismissed for want of personal jurisdiction over him. The question now is not whether Mr. Cheng is personally liable for defamation, but whether Kimberly-Clark is liable for Mr. Cheng's actions.

A threshold question in any defamation action is whether there was publication of the communication. Publication of dafamatory matter is its communication intentionally or by a

negligent act to one other than the person defamed. *Ranous* v. *Hughes,* 30 Wis. 2d 452, 141 N.W.2d 251 (266). It is an established general rule that publication to a third person is an essential ingredient of actionable defamation. *Denny* v. *Mertz,* 84 Wis. 2d 654, 267 N.W. 2d 304 (1978)[1]

In the instant case the deposition testimony of Mr. Cheng and Mr. Wendahl reveal that the memorandum in question was hand delivered from Mr. Cheng to Mr. Wendahl. After reading the memorandum, Mr. Wendahl placed it in his personal files under Mr. Cheng's name. It remained there until it was produced in response to plaintiff's own discovery request. Other than Cheng and Wendahl, no one else read the memorandum prior to the commencement of these proceedings. In terms of Kimberly-Clark's liability, the alleged publication was from Kimberly-Clark to Kimberly-Clark when the memorandum travelled from one Kimberly-Clark employee to another. All this amounts to is the corporation, through its agents, talking to itself. Until the defamatory statement is communicated outside the corporate sphere or internal organization, it has not been published. See *United States Steel Corp.* v. *Darby,* 516 F.2d 961 (5th Cir. 1975); *Church of Scientology of California, Inc.* v. *Green,* 345 F. Supp. 800, 805 (S.D.N.Y. 1973). It is not necessary to reach the issue of qualified privilege or the necessity of proving malice on the part of Mr. Cheng.

Defendant is entitled to summary judgment on the issue of defamation as a matter of law.

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[1] The alleged defamation took place in Wisconsin. That state's law probably governs. Whether it does or not, the result here would be the same, because the law of publication applied in this opinion does not appear to be different in any jurisdiction with contacts with this case. Specifically, this Court holds that the Supreme Court of Arkansas would hold that there has been no publication under the circumstances of this case.

IT IS SO ORDERED this 15th day of October, 1979.

/s/ RICHARD S. ARNOLD,
United States District Judge.

APPENDIX D

28 U.S.C. § 2072. Rules of civil procedure

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein and the practice and procedure in proceedings for the review by the courts of appeals of decision of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

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28 U.S.C. § 2071. Rule-making power generally

The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of

their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court.

(b) Motion for Judgment Notwithstanding the Verdict. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict has been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict has been directed or may order a new trial.

AGE DISCRIMINATION IN EMPLOYMENT ACT

29 U.S.C. Sections 621-634

§621. Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that—

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to

retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

§622. Education and research program; recommendation to Congress

(a) The Secretary of Labor shall undertake studies and provide information to labor unions, management, and the general public concerning the needs and abilities of older workers, and their potentials for continued employment and contribution to the economy. In order to achieve the purposes of this chapter, the Secretary of labor shall carry on a continuing program of education and information, under which he may, among other measures—

(1) undertake research, and promote research, with a view to reducing barriers to the employment of older persons, and the promotion of measures for utilizing their skills;

(2) publish and otherwise make available to employers, professional societies, the various media of communication, and other interested persons the findings of studies and other materials for the promotion of employment:

(3) foster through the public employment service system and through cooperative effort the development of facilities of public and private agencies for expanding the opportunities and potentials of older persons:

(4) sponsor and assist State and community informational and educational programs.

(b) Not later than six months after the effective date of this chapter, the Secretary shall recommend to the Congress any measures he may deem desirable to change the lower or upper age limits set forth in section 631 of this title.

§ 623. Prohibition of age discrimination

Employer practices

(a) It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect

his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

Employment agency practices

(b) It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

Labor organization practices

(c) It shall be unlawful for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Opposition to unlawful practices; participation in investigations, proceedings, or litigation

(d) It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for

an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

Printing or publication of notice or advertisement indicating preference, limitation, etc.

(e) It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

Lawful practices; age as occupational qualification; other reasonable factors: seniority systems; employee benefit plans; discharge or discipline for good cause

(f) It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or

(3) to discharge or otherwise discipline an individual for good cause.

§ 624. Study by Secretary of Labor; reports to President and Congress; scope of study; implementation of study; transmittal date of reports

(a)(1) The Secretary of Labor is directed to undertake an appropriate study of institutional and other arrangements giving rise to involuntary retirement, and report his findings and any appropriate legislative recommendations to the President and to the Congress. Such study shall include—

(A) an examination of the effect of the amendment made by section 3(a) of the Age Discrimination in Employment Act Amendments of 1978 in raising the upper age limitation established by section 631(a) of this title to 70 years of age;

(B) a determination of the feasibility of eliminating such limitation;

(C) a determination of the feasibility of raising such limitation above 70 years of age; and

(D) an examination of the effect of the exemption contained in section 631(c) of this title, relating to cer-

tain executive employees, and the exemption contained in section 631(d) of this title, relating to tenured teaching personnel.

(2) The Secretary may undertake the study required by paragraph (1) of this subsection directly or by contract or other arrangement.

(b) The report required by subsection (a) of this section shall be transmitted to the President and to the Congress as an interim report not later than January 1, 1981, and in final form not later than January 1, 1982.

§ 625. Administration

The Secretary shall have the power—

Delegation of functions; appointment of personnel; technical assistance

(a) to make delegations, to appoint such agents and employees, and to pay for technical assistance on a fee for service basis, as he deems necessary to assist him in the performance of his functions under this chapter;

Cooperation with other agencies, employers, labor organizations, and employment agencies

(b) to cooperate with regional, State, local, and other agencies, and to cooperate with and furnish technical assistance to employers, labor organizations, and employment agencies to aid in effectuating the purposes of this chapter.

§ 626. Recordkeeping, investigation, and enforcement

Attendance of witnesses; investigations, inspections, records, and homework regulations

(a) The Secretary shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this chapter in accordance with the powers and procedures provided in sections 209 and 211 of this title.

Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion

(b) The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided,* That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Secretary; jury trial

(c)(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *Provided,* That the right of any person to bring such action shall terminate upon the commencement of an action by the Secretary to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

Same; filing of charge with Secretary; timeliness; conciliation, conference, and persuasion

(d) No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Secretary. Such a charge shall be filed—

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Secretary shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

Statute of limitations; reliance in future on administrative rulings, etc.; tolling

(e)(1) Sections 255 and 259 of this title shall apply to actions under this chapter.

(2) For the period during which the Secretary is attempting to effect voluntary compliance with requirements of this chapter through informal methods of conciliation, conference, and persuasion pursuant to subsection (b) of this section, the statute of limitations as provided in section 255 of this title shall be tolled, but in no event for a period in excess of one year.

§ 627. Notices to be posted

Every employer, employment agency, and labor organization shall post and keep posted in conspicuous places upon its premises a notice to be prepared or approved by the Secretary setting forth information as the Secretary deems appropriate to effectuate the purposes of this chapter.

§ 628. Rules and regulations; exemptions

In accordance with the provisions of subchapter II of chapter 5 of Title 5, the Secretary of Labor may issue such rules and regulations as he may consider necessary or appropriate for carrying out this chapter, and may establish such reasonable exemptions to and from any or all provisions of this chapter as he may find necessary and proper in the public interest.

§ 629. Criminal penalties

Whoever shall forcibly resist, oppose, impede, intimidate or interfere with a duly authorized representative of the Secretary while he is engaged in the performance of duties under this chapter shall be punished by a fine of not more than $500 or by imprisonment for not more than one year, or by both: *Provid-*

ed, however, That no person shall be imprisoned under this section except where there has been—

§ 630. Definitions

For the purposes of this chapter—

(a) The term "person" means one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups of persons.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: *Provided,* That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer and includes an agent of such a person; but shall not include an agency of the United States.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is fifty or more prior to July 1, 1968, or twenty-five or more on or after July 1, 1968, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended; or

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

§ 631. Age limits.

Individuals at least 40 but less than 70 years of age

(a) The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age but less than 70 years of age.

Employees or applicants for employment in Federal Government

(b) In the case of any personnel action affecting employees or applicants for employment which is subject to the provisions of section 633a of this title, the prohibitions established in section 633a of this title shall be limited to individuals who are at least 40 years of age.

Bona fide executives or high policymakers

(c)(1) Nothing in this chapter shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age but not 70 years of age, and who, for the 2-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of such employee, which equals, in the aggregate, at least $27,000.

(2) In applying the retirement benefit test of paragraph (1) of this subsection, if any such retirement benefit is in a form other than a straight life annuity (with no ancillary benefits), or if employees contribute to any such plan or make rollover contributions, such benefit shall be adjusted in accordance with regulations prescribed by the Secretary, after consultation with the Secretary of the Treasury, so that the benefit is the equivalent of a straight life annuity (with no ancillary benefits) under a plan to which employees do not contribute and under which no rollover contributions are made.

Employees serving under contracts of unlimited tenure at institutions of higher education

(d) Nothing in this chapter shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age but not 70 years of age, and who is serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure) at an institution of higher education (as defined by section 1141(a) of Title 20).

§ 632. Annual report to Congress

The Secretary shall submit annually in January a report to the Congress covering his activities for the preceding year and including such information, data, and recommendations for further legislation in connection with the matters covered by this chapter as he may find advisable. Such report shall contain an evaluation and appraisal by the Secretary of the effect of the minimum and maximum ages established by this chapter, together with his recommendations to the congress. In making such evaluation and appraisal, the Secretary shall take into consideration any changes which may have occurred in the general age level of the population, the effect of the chapter upon workers not covered by its provisions, and such other factors as he may deem pertinent.

§ 633. Federal-State relationship

Federal action superseding State action

(a) Nothing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this chapter such action shall supersede any State action.

Limitation of Federal action upon commencement of State proceedings

(b) In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: *Provided,* That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

§ 633a. Nondiscrimination on account of age in Federal Government employment

Federal agencies affected

(a) All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having posi-

tions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on age.

Enforcement by Civil Service Commission and by Librarian of Congress in Library of Congress; remedies; rules, regulations, orders, and instructions of Commission; compliance by Federal agencies; powers and duties of Commission; notification of final action on complaint of discrimination; exemptions; bona fide occupational qualification

(b) Except as otherwise provided in this subsection, the Civil Service Commission is authorized to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section. The Civil Service Commission shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its resposibilities under this section. The Civil Service Commission shall—

(1) be responsible for the review and evaluation of the operation of all agency programs designed to carry out the policy of this section, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each department, agency, or unit referred to in subsection (a) of this section;

(2) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to nondiscrimination in employment on account of age; and

(3) provide for the acceptance and processing of complaints of discrimination in Federal employment on account of age.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions of the Civil

Service Commission which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. Reasonable exemptions to the provisions of this section may be established by the Commission but only when the Commission has established a maximum age requirement on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position. With respect to employment in the Library of Congress, authorities granted in this subsection to the Civil Service Commission shall be exercised by the Librarian of Congress.

Civil actions; jurisdiction; relief

(c) Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter.

Same; notice to Commission; time of notice; Commission notification of prospective defendants; Commission elimination of unlawful practices

(d) When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

Duty of Government agency or official

(e) Nothing contained in this section shall relieve any Government agency or official of the responsibility to assure nondiscrimination on account of age in employment as required under any provision of Federal law.

Applicability of statutory provisions to personnel action of Federal departments, etc.

(f) Any personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this chapter, other than the provisions of section 631(b) of this title and the provisions of this section.

Study and report to President and Congress by Civil Service Commission; scope

(g)(1) The Civil Service Commission shall undertake a study relating to the effects of the amendments made to this section by the Age Discrimination in Employment Act Amendments of 1978, and the effects of section 631(b) of this title.

(2) The Civil Service Commission shall transmit a report to the President and to the Congress containing the findings of the Commission resulting from the study of the Commission under paragraph (1) of this subsection. Such report shall be transmitted no later than January 1, 1980.

§ 634. Authorization of appropriations

There are hereby authorized to be appropriated such sums as may be necessary to carry out this chapter.

No. 82-1000

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

HENRY P. HALSELL,
Petitioner,

vs.

KIMBERLY-CLARK CORPORATION,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES M. McHANEY
OWENS, McHANEY & CALHOUN
1021 First National Building
Little Rock, Arkansas 72201
501/372-3466
Attorneys for Respondent

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

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REASONS WHY THE WRIT SHOULD NOT BE GRANTED

The first reason why this Court should not issue a writ of certiorari in this case is that the decision below in no way conflicts with applicable decisions of this Court. Contrary to petitioner's assertion, the Court of Appeals' decision is entirely consistent with *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981), and predecessor cases. Here, the Court of Appeals reviewed the evidence produced by petitioner and conclud-

ed that he had failed to show by a preponderance of the evidence that his job performance met Kimberly-Clark's legitimate expectations. Accordingly, the Eighth Circuit concluded that petitioner had not shown that he was "qualified" for the job at issue and, thus, had not produced evidence sufficient to make a prima facie case of employment discrimination under the criteria set forth in *McDonnell-Douglas Corp.* v. *Green*, 411 U.S. 792 (1973) (A-8 and A-9). In this context, the decision below was entirely proper and consistent with prior decisions of this Court.

The Eighth Circuit also recognized that *Burdine* and *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567 (1978), sanction the establishment of a prima facie case where the *McDonnell-Douglas* criteria are not met but the plaintiff produces "sufficient evidence to support an inference that the defendant employer based its employment decision on an illegal criterion." (A-9) Even under this liberal standard, the Court of Appeals concluded, based on its examination of the record, that petitioner failed to establish a prima facie case of age discrimination. The evidence adduced by the petitioner showed that (1) he was 56 years old when hired and 57 when discharged, (2) the dismissal was in the context of business operations, (3) the average age of employees working on the Orizaba project with petitioner was 47 years, and (4) at least eight senior management employees were as old or older than petitioner. Further, he never stated during his extensive testimony that his age had anything to do with his discharge and none of his supporting witnesses made such a claim. Viewed in this light, petitioner certainly did not produce evidence sufficient to permit an inference of age discrimination.

The Court of Appeals, by way of dictum, went on to state that even assuming petitioner had established a prima facie case of age discrimination, respondent's rebuttal "overwhelmingly" established a legitimate, non-discriminatory reason for

discharging petitioner. (A-9) Again correctly applying *Burdine*, the Eighth Circuit concluded that "by satisfying its burden of production, Kimberly-Clark eliminated any inference of discrimination raised by Halsell's prima facie case." (A-11). Further, the Court of Appeals found that respondent's rebuttal case was so strong as to "completely undercut any suggestion that Kimberly-Clark discharged Halsell because of his age" and therefore "a jury could not reasonably have found age discrimination a factor in his discharge." (A-13) This finding, too, is entirely consistent with *Burdine* and prior decisions.

The second reason why this Court should not issue a writ of certiorari in this case is that the evidentiary burdens in employment discrimination cases are now well established by prior decisions of this Court. *See, Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981); *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567 (1978); *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977); *McDonnell-Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). Therefore, consideration of this case would serve no useful purpose.

The third reason this Court should not issue a writ of certiorari is that petitioner made no offer of proof after a verdict was directed against him on his age claim. Further, the record makes clear that petitioner presented his entire case and had an opportunity to rebut Kimberly-Clark's evidence on the age claim. Therefore, petitioner cannot now claim that he was denied an opportunity to present evidence. Both the District Court and the Court of Appeals found that his evidence was insufficient to create a jury question and this Court need not involve itself in a third review of the facts.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

JAMES M. McHANEY
OWENS, McHANEY & CALHOUN
1021 First National Building
Little Rock, Arkansas 72201
501/372/3466
Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that the foregoing RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI was served by mailing a copy, postage prepaid, to Mr. Bill R. Holloway, P. O. Box 391, Lake Village, Arkansas, 71653, Attorney for Henry P. Halsell, on the 10th day of January, 1983.

James M. McHaney